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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-911

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

No. 78-1036

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AS AMICUS CURIAE

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BRIEF FOR THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AS AMICUS CURIAE

INTEREST OF AMICUS

The UAW is a labor organization which directly represents 1.5 million active workers in the United States and Canada. Approximately 7,600 of its members are employed by companies who are members of the Rubber Manufacturers Association, Inc., a respondent in this case. A significant number of those UAW members are exposed to benzene, the product which the Secretary of Labor proposed to regulate under 29 C.F.R. § 1910.1028. All of the UAW's United States members work in operations under state or national health standards which must achieve minimum levels of protection comparable to those health standards promulgated by the Occupational Safety and Health Administration, United States Department of Labor.

The UAW has a long history of devoting its attention to the health and safety concerns of its members, both as an important collective bargaining issue during major contract negotiations and continuously thereafter in the daily operation of the facilities where its members work. In all situations, the UAW is dedicated to the protection of the lives and bodies of workers.

We believe that unless this Court reverses the decision below, the administration of the Occupational Safety and Health Act of 1970 will be dealt a major blow. Some workers are likely to lose their lives or be seriously hurt if a cost-benefit analysis is deemed to be a requirement of the Secretary of Labor's health and safety standard setting procedure.

CONSENT OF THE PARTIES

This brief *amicus curiae* in support of the Petitioners is filed with the consent of all parties.

QUESTION PRESENTED

The Secretary of Labor has the authority to promulgate standards dealing with toxic materials and harmful physical agents pursuant to the Occupational Safety and Health Act of 1970. In promulgating a standard dealing with a known carcinogen, must the Secretary quantify and weigh the expected loss of human life or damage to human health against compliance costs before reducing atmospheric exposure to the lowest level feasible in order to assure no employee will suffer a material impairment of health or functional capacity?

STATEMENT OF THE CASE

This case concerns the Secretary of Labor's (the Secretary) effort to reduce the permissible level of benzene to which workers can be exposed. Benzene is a clear, flammable liquid which vaporizes easily under ordinary atmospheric conditions. It is produced by the petrochemical and petroleum refining industries and used in the manufacture of many products such as rubber. 43 Fed. Reg. 5918. Benzene has been a known toxin since 1900, and was first regulated by the State of Massachusetts Division of Occupational Hygiene in 1934. 43 Fed. Reg. 5918. It has long been known that benzene could cause acute circulatory problems or failure, as well as chronic non-malignant effects such as anemia and leukopenia, and thrombocytopenia.[1] Some of these problems are potentially fatal. On the basis of these facts, the American Conference of Industrial Hygenists (ACGIH) recom-

[1] Anemia is a decline in the red blood cell count causing a reduced supply of oxygen to the body. Leukopenia is a decline in the white blood cell count causing a hyperproprensity to recurrent infections. Thrombocytopenia is a decline in the platelet count causing impaired clotting of the blood. 43 Fed. Reg. 5921-22.

mended a benzene exposure level of 100 ppm in 1946. The ACGIH subsequently reduced the proposed exposure level to 35 ppm in 1948 and to 25 ppm in 1963. 43 Fed. Reg. 5918. In 1971, OSHA adopted the benzene in air exposure level of 10 ppm recommended by the American National Standards Institute as the national consensus standard under 29 C.F.R. § 1910.1000, Table Z-2.

In addition, some scientists have associated benzene with leukemia in humans since 1897. 43 Fed. Reg. 5925. Leukemia is a cancer of the white blood cells, from which there is little chance of permanent recovery. 43 Fed. Reg. 5925.

In 1974, the National Institute for Occupational Safety and Health (NIOSH)[2] submitted a criteria document to the Occupational Safety and Health Administration (OSHA) which noted that the "possibility that benzene can induce leukemia cannot be dismissed." 43 Fed. Reg. 5919. In August, 1976, NIOSH submitted another criteria document which noted an apparent link between exposure to benzene and leukemia. NIOSH recommended an exposure level of 1 ppm in air. 43 Fed. Reg. 5919. By April 15, 1977, the preliminary results of an epidemiological study by Dr. Infante of a Goodyear Tire and Rubber Company facility indicated exposure to benzene was related to a fivefold increased risk of dying of leukemia. 43 Fed. Reg. 5927.

Having been repeatedly prompted to lower the benzene exposure standard by NIOSH, the Assistant Secretary for the Occupational Safety and Health Administration issued an Emergency Temporary Standard for Occupational Exposure to Benzene (ETS), 42 Fed. Reg. 22516.[3] The ETS reduced permissble benzene levels in

[2] NIOSH was created by Congress in 1970 to conduct research in the field of occupational safety and health. 29 U.S.C. §§ 669, 671.

[3] The Secretary's basic authority for emergency temporary standards is found in 29 U.S.C. § 655(c).

air to 1 ppm. The standard never became effective because of a stay order issued by the Court of Appeals for the Fifth Circuit on May 20, 1977. *American Petroleum Institute* v. *OSHA*, No. 77-1516.

On May 27, 1977, OSHA published a proposed permanent standard for occupational exposure to benzene. 42 Fed. Reg. 27452. The proposed standard was to have reduced workplace exposure to benzene in air from 10 ppm to 1 ppm, exempted those work operations where the only exposure to benzene was from liquids containing one percent or less of benzene by volume, and established certain requirements for exposure monitoring, medical surveillance, methods of compliance, liability and record-keeping. Public hearings were held from July 19 through August 10, 1977, at which 95 witnesses appeared on behalf of employer associations, government agencies, public interest groups, unions and other interested persons. The witnesses generated a transcript over 3400 pages long and an exhibit list of over 1400 items.

On February 10, 1978, the Secretary promulgated a new permanent standard for occupational exposure to benzene to be codified as 29 C.F.R. § 1910.1028, 43 Fed. Reg. 5963-70, and accompanied by a statement of reasons 43 Fed. Reg. 5918-63. As originally published, the standard required employers to reduce exposure to benzene in air from 10 ppm to 1 ppm averaged over an eight-hour day; prohibited dermal contact with liquid benzene; required labeling of benzene containers, exposure monitoring, initial respiratory protection as well as engineering and work practice controls. The statement of reasons indicates the Secretary's basic goal was to reduce occupational exposure to benzene to the lowest level feasible. 43 Fed. Reg. 5918, 5932. OSHA subsequently amended the standard on June 27, 1978 which *inter alia* exempted work operations from coverage by the standard where the only exposure was to benzene contained in liquids

which were 0.5 percent benzene by volume. 43 Fed. Reg. 27962-71.

The standard was immediately challenged by various trade associations pursuant to 29 U.S.C. § 655(f), and the cases were consolidated in case No. 78-1253 by the Court of Appeals for the Fifth Circuit. The principal attacks on the standard focused on the reduction of the permissible exposure limit for benzene in air, the prohibition of dermal contact with liquids containing benzene, and the labeling requirements. The reviewing court specifically vacated the permissible exposure limit and the prohibition of dermal contact. The court also vacated the remainder of the standard as integrally related to the two provisions specifically vacated. *American Petroleum Institute* v. *Occupational Safety and Health Administration*, 581 F.2d 493 (5th Cir. 1978), *cert. granted*, Nos. 78-911 and 78-1036 (*API* v. *OSHA*).

ARGUMENT

The Lower Court's Injection Of Cost-Benefit Analysis Into The Act's Standard-Setting Process Is Grave Error.

Upon reviewing the Secretary's decision to reduce workplace exposure to benzene, a known carcinogen, the court below vacated the Secretary's standard on the ground that he failed to balance the industry compliance costs against the expected benefits of the new standard. *American Petroleum Institute* v. *Occupational Safety and Health Administration*, 581 F.2d 493 (5th Cir. 1978), *cert. granted*, Nos. 78-911 and 78-1036.

There are several aspects of the court's decision which are in error and require reversal. As an initial matter, the court ignored § 6(b)(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b)(5), which sets forth the criteria the Secretary of Labor must observe

in promulgating standards for carcinogens. Instead, the court looked to one of the paragraphs in the definitional section of the Act, § 3(8), 29 U.S.C. § 652(8)[4] and held:

> The Act imposes on OSHA the obligation to enact only standards that are reasonably necessary or appropriate to provide safe or healthful workplaces. If a standard does not fit in this definition, it is not one that OSHA is authorized to enact. [581 F. 2d at 502].

The court then went on to hold that in order to determine that a standard is "reasonably necessary," the Secretary must

> determine whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard. [581 F. 2d at 503].

By commanding the Secretary to compare costs against benefits, the court committed two additional, grave mistakes. *First*, the court compels the Secretary to perform a cost-benefit analysis, though the concepts of risk quantification and benefit valuation are nowhere referred to or implied in the Act. *Second*, the court looks for support for this special balancing in the standard promulgation criteria set forth in the wholly different Consumer Products Safety Act, 15 U.S.C. § 2051 *et seq.* This totally inappropriate style of statutory construction yields results which are antithetical to Congress' basic purposes in enacting the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 651 *et seq.*

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[4] 29 U.S.C. § 652(8) provides:

> The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

A. *The Act Does Not Authorize The Secretary To Weigh Lives Against Costs When Dealing With A Carcinogen.*

The Secretary has a special mandate under the OSH Act to regulate exposure to carcinogens. Section 6(b)(5) provides in part:

> The Secretary, in promulgating standards dealing with *toxic materials or harmful physical agents* under this subsection, shall set the standard which *most adequately assures*, to the extent feasible, on the basis of the best *available* evidence, *that no employee will suffer material impairment of health or functional capacity* even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. [29 U.S.C. § 655(b)(5), (emphasis added)].

Congress, through this unusually imperative mandate, informed the Secretary that worker lives are of paramount importance. When regulating a carcinogen, he must establish some specific level of maximum permissble exposure, 29 U.S.C. § 655(b)(5),[5] even where the experts cannot identify a safe level of exposure to the carcinogen, *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974). "[I]t remains the duty of the Secretary to act to protect the workingman, and to act even in circumstances where existing methodology or research is deficient." *Society of Plastics Industries* v. *Occupational Safety and Health Administration*, 509 F.2d 1301, 1308 (2d. Cir. 1975), *cert. den.*, 421 U.S. 992 (1975).

It is also evident from the language of § 6(b)(5) that the Secretary is directed to reduce exposure to a carcinogen to the *lowest* level feasible since the level he must

[5] Section 6(b)(5) also provides in part:

> Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired. [29 U.S.C. § 655(b)(5)].

choose is that which "most adequately assures . . . that no employee will suffer material impairment of health or functional capacity." 29 U.S.C. § 655(b)(5).[6] These words do not authorize utilitarian balancing of costs and benefits by the Secretary. Such balancing would do great violence to the deep concern felt by Congress over the subject of preventable harm to workers.[7]

The lower court's decision violates not only the clear meaning of § 6(b)(5), but the Act's central purpose, as well.[8] By requiring the Secretary to quantify risks and benefits prior to promulgating a standard, the court effectively enjoins OSHA from regulating a carcinogen where there is no known safe level of exposure.[9] It is

[6] The Court below did not challenge the feasibility of the benzene standard. 581 F.2d 493.

[7] As the House Committee on Education and Labor said when it reported favorably on a substantially similar version of the bill that was ultimately passed by both houses:

> As a nation, we simply have not faced up to the truth; our men, women and children are being killed needlessly; they are being maimed, injured, disabled and infected on the job by largely preventable injuries and diseases.
>
> * * * *
>
> Modern logic will not permit the deliberate condoning of death, disease or injury when the causes are identifiable or preventable. . . . The well-being of every American working man and woman is an essential human right which we can no longer deny. [House Committee on Education and Labor, H.R. Rep. No. 91-291, 91st Cong. 2d Sess. 35 (1970); *reprinted in* Senate Committee on Labor and Public Welfare, 91st Cong. 2d Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 865 (*Leg. Hist.* at 865)].

[8] The Congress declares it to be its purpose and policy, . . . to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources . . . [29 U.S.C. § 651(b)].

[9] Were the Secretary able accurately to quantify the risk to health or functional capacity at each level of benzene exopsure, he would have to know the various degrees of safety attached to various levels of exposure.

clear, however, that Congress recognized that a safe level of exposure might not exist. House Committee on Education and Labor, H.R. Rep. 91-1291, 91st Cong., 2d Sess. 15 (1970); *reprinted in* Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., *Legisiative History of the Occupational Safety and Health Act of 1970* at 845 (*Leg. Hist.*). Congress also recognized that scientific developments had only recently demonstrated any kind of relationship between various industrial substances and processes and certain chronic diseases and cancer. Senate Committee on Labor and Public Welfare, S. Rep. 91-1282, 91st Cong., 2d Sess. 2 (1970); *Leg. Hist.* at 142. However, Congress did not intend the Secretary to be "paralyzed by debate surrounding diverse medical opinions," House Committee on Education and Labor, H.R. Rep. 91-1291, 91st Cong., 2d Sess. 18 (1970); *Leg. Hist.* at 848, but directed him to set a standard on the basis of the "best available evidence." 29 U.S.C. § 655(b)(5). The court below adopted just the opposite interpretation of § 6(b)(5):

> By requiring the consideration of such kinds of information, Congress provided that OSHA regulate on the basis of knowledge rather than on the unknown. (Citing as contrary authority *SPI* v. *OSHA*, 509 F. 2d at 1308.) [*API* v. *OSHA*, 581 F. 2d at 504].

Based on that interpretation, the Court of Appeals commanded OSHA to wait until the risks are quantifiable before promulgating a benzene standard.

The court's insistence on cost-benefit balancing not only *delays* the setting of a benzene standard, but also ensures that the standard, if finally set, will be unfaithful to the paramount priority § 6(b)(5) gives human life. The usual mathematical method by which costs and benefits are comparable is through performance of a traditional cost-benefit analysis. A cost-benefit analysis in the area

of life or health preserving measures typically entails not only attaching monetary figures to the cost of a measure, but also the dollar valuation of benefits.[10] In order to attach a dollar value to a life saved or health preserved by a measure, the life itself must be valued. Yet the very step of valuing a life in dollar terms and balancing it against the cost of workplace safety measures *assumes* the life is not worth the cost to preserve it if the cost figure is greater than the life value figure. That assumption about the value of life is contrary to the Secretary's statutory mandate in § 6(b)(5).[11]

Even under the so-called "cost-effectiveness" approach as proposed by some witnesses during the informal hearings, the court would be asking OSHA to engage in tradeoffs or balancing. *E.g.*, Dr. Zeckhauser, Tr. 2142-2143. Those same witnesses go so far as to suggest OSHA should maximize benefits as they relate to the total costs borne by the consumer, Dr. Zeckhauser, Tr. 2158, or engage in relative acceptible risk analysis in light of the costs of preventing disease. Dr. Wilson, Ex. 149B at 23-27.

The balancing those witnesses and the court below seek was completed by Congress in 1970. That balancing was embodied in the statute in the concept of feasibility.[12] As

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[10] *See*, J.P. Acton, *Measuring the Monetary Value of Lifesaving Programs*, 40 JOURNAL OF LAW & CONTEMP. PROB. 46 (Aut. 1976).

[11] We do not argue that the express cost-benefit analysis required by Judge Clark might not be appropriate with regard to other agencies and other statutes. Rather, the UAW contends that such analysis is inappropriate with respect to the Occupational Health and Safety Administration's standard setting functions.

[12] Sen. Javits added the term "feasible" to S. 2193 because "the Daniels Bill . . . might be interpreted to require absolute health and safety in all cases . . . ." Senate Committee on Labor and Public Welfare, S. Rep. No. 91-1282, 91st Cong. 2d Sess. 5; *Leg. Hist.* at 197 (Individual Views of Mr. Javits).

long as the facts support a feasibility determination,[13] Congress has decreed that the balance between preserving the lives of working people and the cost thereof has been properly made.[14] It is not the function of the courts to supplant Congress in its role of policy maker, *Tennessee Valley Authority* v. *Hill*, —— U.S. ——, 98 S. Ct. 2279, 57 L. Ed. 2d 91 (1978), regardless of how absurd the result may seem to the challengers, *Director, Worker's Compensation Programs* v. *Rasmussen*, —— U.S. ——, 99 S. Ct. 903, 913, 59 L. Ed. 2d 122, 135 (1979) (unanimous decision).

> The fundamental policy questions appropriately resolved in Congress . . . are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. [*Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) (emphasis original)].

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[13] The concept of feasibility has been bifurcated to cover technological feasibility, *SPI* v. *OSHA*, 509 F.2d at 1308-1310, as well as economic feasibility, *American Federation of Labor* v. *Brennan*, 530 F.2d 109, 120-123 (3rd Cir. 1975); *American Iron & Steel Institute* v. *Occupational Safety and Health Administration*, 577 F.2d 826, 832-835 (3rd Cir. 1978), App. Pend. Nos. 78-918, 78-919. A standard is not economically feasible if it creates massive dislocation for an industry, *AISI* v. *OSHA*, 577 F.2d at 836; *AFL* v. *Brennan*, 530 F.2d at 123. *See also, IUD* v. *Hodgson* indicating any given employer may be forced out of business by a standard which is nevertheless economically feasible. 499 F.2d at 478.

[14] *Note*, there currently exists a dispute between the Circuit Courts of Appeals as to whether the concept of *feasibility* as applied to a single employer through enforcement proceedings must involve some form of cost-benefit or cost-effective analysis. *Compare, Southern Colorado Prestress Co.* v. *Occupational Safety and Health Review Commission*, 586 F.2d 1342 (10th Cir. 1978) with *RMI Co.* v. *Secretary of Labor*, —— F.2d ——, 1979 OSHD ¶ 23,386 (6th Cir. 1979); and *Turner Co., Div. of Olin Corporation* v. *Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977).

B. *The Lower Court's Sole Justification For Reading A Cost-Benefit Requirement Into The Act Is Its Interpretation Of A Different Statute.*

The Court of Appeals sought to justify its injection of a cost-benefit requirement into the OSH Act by seizing upon the words "reasonably necessary" in the definitional section, § 3(8), and ignoring the standard setting criteria of § 6(b)(5). It then read into those words the same meaning it assigned them in its decision in *Aqua Slide* v. *Consumer Product Safety Commission*, 569 F.2d 831 (5th Cir. 1978), *construing the Consumer Product Safety Act*, 15 U.S.C. § 2051, *et seq.*[15] In so doing, the lower court lost sight of the fact that in the OSH Act it was interpreting a unique statute and not creating its own general regulatory policy. The court said:

> [w]e decline to construe the precisely similar requirements of these two Acts differently . . . [581 F. 2d at 502],

even though the requirements are not similar at all. Not only do the words "reasonably necessary or appropriate" not appear in the definitional section of the CPSA,[16] but

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[15] *E.g.*, § 7(a), CPSA provides:

> A consumer product safety standard shall consist of one or more of any of the following types of requirements.
>
> * * * *

Also, § 9(c)(2), CPSA provides:

> The Commission shall not promulgate a consumer product safety rule unless it finds and includes such finding in the rule—(a) That the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk to injury associated with such product. [15 U.S.C. § 2058(c)(2)].

[16] Section 3(a)(7) provides:

> The term 'consumer product safety rule' means a consumer product safety standard described in section 2056(a) of this title, or a rule under this chapter declaring a consumer product a banned hazardous product. [15 U.S.C. § 2052(a)(2)].

the two acts have very different approaches to the promulgation of standards, and their basic philosophies are not compatible.

Both statutes are governed by the substantial evidence test, according to their express terms.[17] However, under the express language of the CPSA findings which must be supported by substantial evidence include:

> appropriate findings for inclusion in such rule with respect to—
>
> (A) The degree and nature of the risk of injury the rule is designed to eliminate or reduce; [15 U.S.C. § 2058(c)(1)(A)].

Such findings were obviously what the court below had in mind when it held that, under the OSH Act the Secretary must quantify the risks before acting. 581 F.2d at 504-505. Yet, the OSH Act makes no such reference to risk analysis. Nor can one legitimately be implied.

The CPSA is permeated by the concept of "unreasonable risk" in the tort case. *Aqua Slide* v. *CPSC*, 569 F.2d at 839; *Forester* v. *Consumer Product Safety Commission*, 559 F.2d 774 (D.C. Cir. 1977).[18] In the context of tort law, the value of a product to society is weighed against the harm to those who use and are injured by it.[19] But in the OSH Act, Congress left no room for

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[17] *Compare*, § 11(c), CPSA, 15 U.S.C. § 2060(c) and § 6(f), OSHA, 29 U.S.C. § 655(f).

[18] *See*, Congressional findings and declaration of purpose, § 2, CPSA, 15 U.S.C. § 2051.

[19] The requirement that the risk be 'unreasonable' necessarily involves a balancing test like that familiar in tort law: The regulation may issue if the severity of the injury offsets the harm the regulation itself imposes upon manufacturers and consumers, (footnote omitted) [*Forester* v. *CPSC*, 557 F.2d at 789].

special balancing outside the concept of feasibility.[20] In addition to what is said in § 6(b)(5), Congress declared it to be its purpose in enacting the OSH Act "to assure *so far as possible* every working man and woman in the nation safe and healthful working conditions." 29 U.S.C. § 651(b) (emphasis added).

In enacting CPSA, Congress' concern was not with banning all product hazards to the extent feasible, but with protecting "the public against *unreasonable risks* of injury associated consumer products." § 2(b)(1), CPSA, 15 U.S.C. 2051(b)(1) (emphasis added). The Congress' concerns and concepts were those utilized in tort law. *Forester* v. *CPSC*, 559 F.2d at 789 n.1 (and accompanying text). The more careful, generalized balancing contemplated in tort law and required of the Commission under the CPSA is not relevant to the quite different matter of preserving worker lives and health. It was therefore totally inappropriate for the court first to conclude the Congressional purpose embodied in the CPSA is the same as that in the OSH Act, and then to hold that since the CPSA requires a cost-benefit analysis, the OSH Act must too!

Although giving the words "reasonably necessary" in § 3(8) precedence over § 6(b)(5) and interpreting those words to say what they mean in a different statute is error, § 3(8) must nevertheless be construed. In light of the detailed directions given the Secretary in § 6(b)(5), the words in § 3(8) should not be read to establish a new, separate factual test which the Secretary must meet. Instead, the words should be read to confirm the requirement that any choices the Secretary makes with regard to standards must be reasonable. Such a reading preserves the distinction between factfinding and policymaking as appreciated by the courts which have reviewed

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[20] *See*, discussion above at p. 11-12.

occupational safety and health standards in light of the Act's legislative history.[21] It also avoids the conclusions that the Secretary is not empowered to make policy choices in the absence of hard facts,[22] or that he must make findings not mandated by the language of § 6(b)(5).

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[21] The standard of review § 6(f), OSH Act, 29 U.S.C. § 665(f) was added to S. 2193 at Conference as part of a compromise to some House fears that the Secretary of Labor would become too powerful. *See, e.g.*, House Committee on Education and Labor, H.R. Rep. 91-1291, 91st Cong. 2d Sess., Report on Occupational Safety and Health Act, Minority Views and Additional Minority Views, 53-55 (1970); *Leg. Hist.* at 883-885; and Rep. Anderson, *Leg. Hist.* at 1070, remarks in support of the Steiger-Sikes substitution (Nov. 23, 1970). The addition of the passage:

> The determination of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole, [29 U.S.C. § 655(f)],

was intended to insure factual findings would be based on probative evidence not just views and arguments. *See, Leg. Hist.* at 884. This created some ambiguity as to the scope of review. All of the Courts of Appeals have concluded that they must distinguish between legislative-like decisions and factual findings. In *IUD* v. *Hodgson*, 499 F.2d 467, the court upheld the Secretary's asbestos standard pursuant to 29 U.S.C. § 655(f) saying that provision required the court to distinguish between facts needing a basis in substantial evidence and policies which were required to meet the arbitrary and capricious test. 499 F.2d at 474-476. Denying petitions to review an ethyleneimine standard under 29 U.S.C. 655(f), former Justice Clark distinguished between substantial evidence review of factual matters subject to evidentiary development and review of policy decisions through the legal criteria governing the Secretary's consideration of relevant factors. *Synthetic Organic Chemical Manufacturers* v. *Brennan*, 503 F.2d 1155, 1159-1160 (3rd Cir. 1974), *cert. den.*, 402 U.S. 973 (1975). *See also, SPI* v. *OSHA*, 509 F.2d 1301, in which the Second Circuit upheld the vinyl chloride standard. It distinguished between traditonal facts and "ultimate facts . . ." where "though the factual finger points it does not conclude." Since the latter situation existed, the Secretary's choice to err on the side of worker health was found consistent with his duty under the act and was therefore upheld. 509 F.2d at 1308.

[22] *See*, discussion above, p. 9-10.

CONCLUSION

For the reasons discussed above, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the standard upheld.

Respectfully submitted,

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